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SOL (MSHA) V. HELDENFELS BROS.
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceedings Docket No. DENV 79-575-PM A.O. No. 41-02733-05003 F
v.		Docket No. DENV 79-576-PM A.O. No. 41-02733-05004
HELDENFELS BROTHERS, INC.,	RESPONDENT	Felder Uranium Operation

DECISION

Appearances: Robert A. Fitz, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, for Petitioner H. C. Heldenfels, Jr., Esq., Corpus Christi, Texas, for Respondent

Before: Judge Stewart

Procedural Background

The above-captioned cases are civil penalty proceedings brought pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), hereinafter referred to as the Act.

On July 2, 1979, Petitioner filed with the Mine Safety and Health Review Commission petitions for assessment of civil penalty in these cases. Respondent filed its answers to these petitions on July 26, 1979. The hearing in these matters was held on September 14 and 15, 1979, in Corpus Christi, Texas.

Before the conclusion of the hearing, the parties were informed of their right to submit proposed findings of fact and conclusions of law. A timetable for submission of these briefs was also established. Petitioner was given 30 days after receipt of the transcript to file its brief. Respondent was given 20 days after receipt of Petitioner's brief to file a rebuttal brief. Petitioner was then to have 15 days from receipt of Respondent's rebuttal to file its rebuttal brief. A letter was filed by Petitioner on October 22, 1979, explaining why it was felt that MSHA should prevail. This letter was intended to be Petitioner's posthearing brief, although it did not bear a heading or label to specifically designate it as such. Counsel for Respondent filed a letter in reply on October 26, 1979.

On December 13, 1979, Respondent filed a motion to dismiss the above-captioned proceedings on the grounds that Petitioner had failed to comply with an order of the Judge to file posthearing briefs. The motion was denied since it was evident at that time that Petitioner either chose not to submit a posthearing brief or intended for the letter of October 22, 1979, to serve as such a brief. The briefing schedule set forth time periods within which briefs must be filed if the parties desired to file briefs. The setting of these time periods was in the nature of an agreement between the parties rather than an order of the Judge. The failure of Petitioner to submit a brief or file a document specifically designated as a brief within the aforementioned time period was, therefore, insufficient grounds for dismissal of the above-captioned proceedings. However, in view of the confusion which may have arisen on the part of Respondent, the parties were afforded additional time to file concurrent posthearing briefs if they desired to do so. It was ordered that if a party desired to submit a posthearing brief, it must be filed within 20 days of the date of the order which was issued on January 7, 1980.

On January 21, 1980, Petitioner asserted that "the Secretary of Labor does not desire to supplement his letter brief dated October 19, 1979." Respondent has not filed an additional posthearing brief.

Findings of Fact and Conclusions of Law

The parties entered into the following stipulations at the hearing: (1) that the Felder Uranium Operation is covered by the Act of 1977, (2) that Joseph Allen Blair was fatally injured on July 25, 1978, while employed as a mobile equipment operator by Heldenfels Brothers, Inc., at the Felder Uranium Operation, (3) Citation Nos. 169501, 169213, and 170074 and the modifications thereto were served upon Heldenfels Brothers, Inc., by MSHA and may be received into evidence with the purpose of establishing their issuance but not for the truthfulness of any statements therein, and not for showing that citations were issued within a reasonable time after the alleged violations occurred, (4) if a civil penalty is assessed in these proceedings it will not affect the ability of Heldenfels Brothers, Inc., to continue in business, (5) employees of Heldenfels Brothers, Inc., worked approximately 9,386 hours at the Felder Uranium Operation in 1978, (6) employees of Heldenfels worked approximately 218,983 hours at all of the operations in 1978, and (7) prior to July 25, 1978, Heldenfels did not have a history of previous violations at the Felder Uranium Operation.

Citation No. 169501

Citation No. 169501 was issued by inspector Robert W. White on September 20, 1979, pursuant to section 104(a) of the Act. The inspector cited a violation of 30 C.F.R. 56.9-24 (which was timely amended to read 30 C.F.R. 55.9-24) and described the pertinent condition or practice as follows: "According to the witness interviewed, the 631D fatally injured scraper operator did not have full control of the equipment while in motion."

Joseph Allen Blair, the operator of a 631D scraper, was killed when his vehicle collided with a second scraper on July 25, 1978. The collision occurred on Respondent's haul road, 20 to 30 feet beyond a "Y" intersection. The haul road was curved at the point of impact and its surface was on a slight incline to Mr. Blair's right. The road was composed of hard-packed sand. It was sprayed with water on a regular basis to keep the road surface hard and to minimize dust problems. The area in which the accident had occurred had been properly sprayed with water a short time before the accident.

Mr. Blair was hauling material from one of Respondent's pits to a stockpiling site. Mr. Young, the operator of the second scraper, was returning to the pit after having deposited his load at the stockpile. In failing to negotiate the curve to his right, Mr. Blair's vehicle crossed onto Mr. Young's side of the road and collided there with Mr. Young's scraper. The cab in which Mr. Blair sat was completely severed from the body of the scraper. The scraper thereafter caught fire.

Section 55.9-24 requires that the operators of mobile equipment shall have full control of the equipment while it is in motion. In failing to negotiate a turn to his right, it is clear that Mr. Blair did not maintain the control over his vehicle that this section requires. The haul road was wide--approximately 250 feet--and there is no indication that Mr. Blair tried to turn, brake, or drop the pan. Dropping the pan would have stopped the scraper immediately. Both Maria Cortez and Domingo Rodriquez, operators of other equipment at the mine who witnessed the accident, testified that Mr. Blair's vehicle skidded "a little bit" as it failed to negotiate the turn prior to the impact. Although physical evidence which might have substantiated these observations was obliterated by the use of a great amount of water to extinguish the scraper fire, the record clearly establishes that the vehicle skidded slightly prior to impact. The testimony of these time witnesses who are bilingual is clear as to all relevant matters about which they testified. It was obvious that they understood the pertinent questions in English and that they were capable of answering accurately in English. Their testimony that a skid occurred was not rebutted. Mr. Rodriquez added that he believed Mr. Blair had been traveling too fast but he did not state the speed of the vehicle in miles per hour. Respondent's superintendent, Mr. Marvin Holcombe, who did not see the collision occur, testified that on that particular haul road a normal speed for a loader scraper was between 18 and 20 miles an hour and that Mr. Blair's speed "had to be" somewhere between 18 and 20 miles an hour.

Mr. Holcombe based his conclusions as to the speed of Mr. Blair's scraper on his post-accident wreckage and information later obtained during an investigation rather than on direct observation. The accident happened 8 or 9 minutes after Mr. Holcombe drove up the hill to the dump area. Mr. Blair had been pulling onto the haul road from a ramp as Mr. Holcombe passed by and Mr. Blair came in behind Mr. Holcombe's truck. Mr. Holcombe, who went to the scene immediately after the accident, was about

300 yards away and his head was turned when he heard the impact.

Although four marijuana cigarettes were found in the pocket of the scraper operator after the removal of his body from the mine area, it was not established that he had been smoking them or that he was under the influence of any substance that might have caused him to collide with the other scraper.

No plausible cause for the accident exists other than the failure of Mr. Blair to control his vehicle. The scraper was disassembled and examined after the accident. No mechanical defects which might have contributed to the accident were discovered. Moreover, there is no evidence that road conditions contributed to the accident. Shortly before the accident, the road had been wet down to minimize dust and keep the surface hard. The road had been sprayed properly with no puddles of water left standing and it had been cleaned. The record does not support a finding that the surface was slick in the area where the scraper skidded or where the collision occurred. A number of the witnesses noted that there were some spots of blue clay in the roadway that became slippery when wet but it was not established that these spots were in the roadway at the site of the accident. Mr. Holcombe, who sometimes drove the haul road 15 to 20 times a day, testified more specifically that the blue clay near the accident site was located to the right of the roadway. He noted that some clay could be found in the roadway at a location beyond that site. This clay fell from haulage vehicles at times, but it was cleaned from the roadway. The blade used to clean the haul road followed the water truck which had sprayed the roadway and it had cleaned the road prior to the accident. Mr. Blair failed to maintain control of his vehicle as required in violation of section 55.9-24.

Although the record clearly establishes a violation by Heldenfels, Inc., the accident was solely the result of fault on the part of the operator of the scraper. As acknowledged by Petitioner's assessment officer prior to the filing of the Petition for Assessment of a Civil Penalty "* * * absolute control of this equipment is only governed by the operator himself * * *." Although it is the responsibility of management to instruct and enforce safe working practices and procedures that will ensure the safety of all of the employees, there must be adequate proof that Respondent failed in its responsibility in order to support a finding of negligence on the part of Respondent.

The record does not establish that Respondent knew or should have known of any condition that might have caused the scraper operator to fail to maintain control of his equipment or that Respondent failed to exercise reasonable care to correct any condition or practice which might have caused the violation. Since Respondent could not reasonably have known of any condition or practice which might have caused the violation and had taken reasonable precautions to prevent such violations the record does not support a finding of negligence on the part of Respondent. Mr. Blair was an experienced scraper operator with a good record. Mr. Holcombe's testimony that Respondent disciplined those operators who did not operate the scrapers properly was

unrebutted. Respondent instructed its operators, including Mr. Blair, on the use of the scraper. The operators were apprised of speed limits, speed control, traffic control and traffic patterns every morning. Finally, the

investigation of the accident revealed no equipment defects or dangerous road conditions attributable to the negligence of Respondent.

Citation No. 169213

Citation No. 169213 was issued by inspector Alex Baca on July 25, 1978, pursuant to section 104(a) of the Act. He cited 30 C.F.R. 55.9-22 and described the condition or practice as follows: "The outer berm on the roadway on east and south side of Felder No. 3 was not high enough to contain the equipment using the travel road." The inspector estimated that additional berms were necessary along 50 yards of roadway adjacent to Respondent's Felder No. 3 pit. The pit was at least 75 feet deep in this area. The distance between the roadway and the pit wall was from 10 to 15 feet. The berm in question was comprised of a sandstone-like material and clay, and had a width of 3 feet at its base. Its height ranged to a maximum of just over 2 feet. The berm was entirely absent for a distance of 3 or 4 yards where a ramp proceeded into the Felder No. 3 pit.

Section 55.9-22 requires that berms or guards shall be provided on the outer bank of elevated roadways. The regulations do not provide criteria by which the minimum height of these berms might be determined. Inspector Baca testified that he applied a "rule of thumb" to the effect that a berm must be as high as the axle of the largest vehicle using the road. The largest vehicles using this section of roadway were Respondent's scrapers. These scrapers had a wheel height of approximately 6 feet and, therefore, an axle height of approximately 3 feet. Although the height of the berm varied, it was generally 2 feet high--1 foot lower than the height which would be required if the rule of thumb applied.

The inspector, in relating experiences with scrapers similar to those used by Respondent and with ridge rows of different heights, stated that the scrapers would go over "a two foot deal all the time." Although the ridge rows were not of exactly the same material, consistency, and size of the berms, the inspector obviously was knowledgeable concerning the type of berm that would contain equipment used at the mine.

The conclusion of the inspector is accepted. The maintenance of the berm at heights generally of 2 feet was in violation of section 55.9-22 as alleged.

The Respondent was negligent in that the condition was visually obvious but steps were not taken to correct it prior to the issuance of the citation.

An accident was probable. The berms were located alongside a regularly used roadway and they were not high enough to restrain the scrapers. If an accident were to occur, fatal or serious injury would be anticipated.

The condition was abated with a normal degree of good faith.

Citation No. 170074

Inspector Robert White issued Citation No. 170074 on July 25, 1978, pursuant to section 104(a) of the Act. He cited 30 C.F.R. 55.9-71 and described the pertinent condition or practice as follows: "Traffic rules including speed and warning signs had not been posted in the pit area where the mining equipment is being operated."

The inspector testified that the citation referred to an area extending from the shop to the pit, a distance of approximately one-half mile. No speed limit or traffic warning signs were posted in this area. Although there was a speed limit sign at the gate, there was none posted in the mine area proper. Section 55.9-71 requires that traffic rules, including speed signals, and warning signs shall be posted. The failure on the part of Respondent to post speed and traffic control signs in this area was in violation of the mandatory standard, as alleged.

Respondent was negligent in its failure to comply with section 55.9-71. The absence of the required signs was obvious, yet Respondent failed to correct the situation prior to the issuance of the citation.

Although an accident in the area could cause a fatal or serious injury, it was improbable that an accident or injury would occur because of the violation. Mine personnel who operated vehicles were instructed every morning where to haul and which haul road to take. It is unlikely that they would be unaware of the traffic rules in effect. There was also little likelihood that non-mine personnel would travel beyond the shop area and onto the length of roadway affected by the citation.

This condition was abated with a normal degree of good faith.

Respondent's Motion to Dismiss

On July 26, 1979, Respondent filed a motion to dismiss these proceedings. As grounds for this motion, it was asserted that an unreasonable length of time was taken by MSHA to propose a civil penalty. Respondent cited section 105(a) of the Act which reads in pertinent part as follows:

> If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited * * *.

This motion to dismiss was denied on August 15, 1979, subject to reconsideration upon the presentation of additional evidence at the hearing. The motion was renewed by Respondent at the hearing and again denied.

At the hearing, Petitioner introduced into evidence two documents entitled "Results of Initial Review." These documents were dated March 2,

1979, and had been prepared by MSHA pursuant to 30 C.F.R. 100.5. By the terms of these documents, Respondent was given an opportunity either to pay the suggested penalties, to submit additional evidence for consideration or to request a conference with MSHA's Office of Assessments.

Two hundred twenty days had elapsed from the date of issuance of Citations No. 169213 and 170074, and the date of issuance of the Results of Initial Review. Approximately 165 days had elapsed from the date of issuance of Citation No. 169501 to the date of issuance of the corresponding Results of Initial Review.

Each of the three citations alleged violations relating to events which occurred and conditions which existed on July 25, 1978. Citation No. 169213 (berms) and Citation No. 170074 (traffic signs) were issued by the inspector on July 25, 1978, the same date as the alleged violations. These citations alleged violations by Heldenfels Brothers (an independent contractor). In subsequent actions on July 27, 1978, and July 28, 1978, citations were issued modifying the original citations to allege violations by Exxon Minerals Company, USA (the operator). In subsequent actions on October 6, 1978, citations were issued to correct the modification and again allege that the violations were by Heldenfels Brothers.

Citation No. 169501 (failure to have full control of equipment on July 25, 1978), was not issued until September 20, 1978. This citation which alleged a violation by Exxon Minerals Company, USA, was modified by subsequent action in the form of an additional citation, issued on October 8, 1978. The operator's name was changed on this citation to read Heldenfels Brothers. The initial citation alleged a violation of Part 56.9-24. A subsequent action citation issued on November 15, 1978, corrected the part number to allege a violation of Part 55.9-24.

At the hearing, Petitioner also introduced a document entitled "Results of Initial Review" on Form 1000-178 (MSHA) which listed a penalty of $56 for Citation No. 169213 and a penalty of $48 for Citation No. 170074. The date of this document (Exh. P-6) was October 3, 1978.(FOOTNOTE 1) The company name listed on the form was Exxon Minerals Company, USA. The mine name listed was Felder Uranium Operation. A handwritten notation dated October 6, 1978, on this document indicated that a request had been made to recall the violations listed for reassessment because they were "fatal related." In its motion to dismiss, filed July 26, 1979, counsel for Respondent stated that he had received this document but had been informed upon inquiry that it had been

withdrawn and would be reissued at a later time.(FOOTNOTE 2) The record shows that the penalties in subsequently issued "Results of Initial Review" and in the "Proposed Assessment" were increased slightly, from $56 to $78 for one violation and from $48 to $56 for the other.

In its "Memorandum in Opposition to Respondent's Motion to Dismiss" filed on August 8, 1979, Petitioner argued that its inspection and investigation did not end with the issuance of the citations. Petitioner's rationale was that "such inspection and investigation continued through the consideration of additional evidence submitted in response to the notification of the Results of Initial Review which was dated March 2, 1979." Respondent in its "Memorandum in Opposition to Petitioner's Memorandum" filed on August 17, 1979, replied that there was no further investigation or inspection by MSHA after the original Results of Initial Review and the citations were issued on September 20, 1978.

The record indicates that Respondent's investigation, which included dismantling and inspection of the scraper, continued until the month of September, 1979. There is no indication that any actual investigation or inspection by either Petitioner or Respondent occurred after that time. Although the record does not support a finding that MSHA performed any actual investigation or inspection after September 20, 1978, MSHA regulations prescribe procedural steps in the assessment process that must be taken after the issuance of citations. These assessment procedures which normally require considerable time set forth each procedural step, set time limits for some of the steps, and authorize the submission of additional evidence for consideration as well as a conference with the Office of Assessments to provide information relating to the violations.

The reasonableness of the alleged delays about which Respondent complains must be determined in light of the provisions of 30 C.F.R. 100, as

well as the unusual factual aspects of this case. Part 100 sets forth the criteria and procedures for the proposed assesment of civil penalties under sections 105 and 110 of the Federal Mine Safety and Health Act of 1977. It is the purpose of those rules to provide for the prompt and efficient proposal and collection of penalties in order to insure maximum compliance by the coal and metal/nonmetal mining industries with the requirements of the Act and the standards and regulations promulgated pursuant to the Act.

The guidelines given in Part 100 provide some indication of the normal timetable for notifying operators of a proposed penalty. These provisions set forth a formula for determining the proposed penalty, prescribe circumstances under which the formula need not be used, and state in detail the steps that may be taken in the assessment procedure.

Some of these procedural steps prescribed by Part 100 are in general, as follows: Referral by MSHA to the Office of Assessments, initial review of citation (including formula computations), service of results of initial review on party and miners, request for conference or submission of additional evidence for consideration, conference, determination of proposed penalty, service of notice of proposed penalty, payment of uncontested proposed penalty by party charged, notification of contest of proposed assessment, referral of case to solicitor and notification of commission.

As to the first step listed, subpart 100.5(a) provides that "All citations which have been abated and all closure orders, regardless of termination or abatement, will be promptly referred by MSHA to the Office of Assessments for a determination of the fact of the violation and the amount, if any, of the penalty to be proposed." The time for abatement of a citation allowed by the inspector must be reasonable and it is dependent upon what must be done to correct the condition found.

Some of the steps listed must be taken immediately, or immediately by regular mail. For others, no time limit is specifically prescribed. Examples of the lengths of time specifically prescribed for some steps are 10 days, 33 days, 20 days, and 30 days. The 33-day limit is that prescribed for the conference. Additional time is allowed for this step under certain conditions. After completion of the assessment procedures under Part 100, the Secretary must file a proposal for a penalty with the Commission within 45 days of receipt of a timely notice of contest of a notification of proposed assessment of penalty. 29 C.F.R. 2700.27.

The procedures prescribed by Part 100 are consistent with the provisions of the Administration Procedural Act which state that "The agency shall give all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and (2) to the extent that the parties are unable to determine a

controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title." 5 U.S.C. 554(c).

There is no indication in the record that time, the nature of the proceeding, or the public interest did not permit the exercise of the orderly assessment procedures prescribed by Part 100.

While the procedures prescribed by those rules may delay the date of a hearing, they provide additional due process to operators, especially small operators without in-house counsel. They may also result in a saving of time in the long run by resolving issues prior to a hearing. In many instances, the need for taking testimony and conducting a hearing is eliminated.

The fact that Respondent did not submit additional evidence for consideration by the assessment officer or request a conference saved little time. A conference in this particular case might have actually shortened the pre-hearing process or eliminated the need for a hearing. The fact that no mechanical defects were found when the scraper was dismantled by Respondent was relevant information that did not become available until some time after the accident and may not have been considered by the assessment officer. It also appears from the narrative statement attached to the Results of Initial Review, March 2, 1979, that the assessment officer was unaware of Respondent's efforts to instruct and enforce safe working practices and procedures. Specifically, Respondent's practice of instructing drivers on the use of particular vehicles, of disciplining drivers for improper operation of their vehicles and of notifying drivers of the traffic rules on a daily basis may not have been considered. Information of this type which might have been furnished at a conference would undoubtedly have been useful to the Assessment Officer in expediting the case in the event that it had not been obtained from other sources.

The state of law in regard to whether the operator or the independent contractor should be cited was somewhat unsettled during the relevant times. The law on this subject was not clarified until October 29, 1979, when the Federal Mine Safety and Health Review Commission issued its decision in Secretary of Labor, Mine Safety and Health v. Old Ben Coal Company, Docket No. VINC 79-119. MSHA's vacillation and apparent indecision in modifying and remodifying the citations and Results of Initial Review in the case-at-hand are more understandable in view of the confused state of the law prevailing at that time. Had MSHA proceeded with the issuance of a notice of proposed penalty to the wrong party and caused a hearing to be held before the Old Ben decision in October of 1979, that action might have resulted in appeals, remands, and additional hearings, and in greater delays.

It has not been shown that the time complained of was unreasonable, that Respondent was misled, or that Respondent suffered any actual harm as a result of Petitioner's alleged delay. If there had been a need for review of the citations prior to completion of the assessment procedures, Respondent was not without a remedy. It could have filed a Notice of Contest of those citations under the provisions of 29 C.F.R. 2700.20 (Rules of Procedure) at any time within 30 days after the

issuance of the citations. If Respondent was able to establish exigent circumstances warranting expedition, an expedited hearing could have been held within a few days after

the citation was issued. 29 C.F.R. 2700.52. The only apparent consequence of the delay established by the record is that Respondent was, in effect, given that much additional time before it was required to pay penalties for the violations.

Respondent did not demonstrate that MSHA failed to provide notification of the proposed assessment within a reasonable time as required by Section 105(a) of the Act or that Heldenfels Brothers, Inc., was adversely affected because of the time taken by MSHA to do so. The denial at the hearing of Respondent's motion is hereby affirmed.

Proposed findings of fact and conclusions of law inconsistent with this decision are rejected.

Assessments

In consideration of the findings of fact and conclusions of law contained in this decision, the following assessments are appropriate under the criteria of section 110 of the Act.

Citation No.	Penalty
169501	$100
169213	78
170074	56

ORDER

It is hereby ORDERED that Respondent pay the sum of $234 within 30 days of the date of this decision.

Forrest E. Stewart
Administrative Law Judge

~FOOTNOTE 1
Respondent stated that in its memorandum submitted on August 17, 1979, that it would have filed a motion to dismiss had the Original Results of Initial Review and Citation not been withdrawn, on the basis that the period of time that elapsed since July 25, 1978, was not a reasonable time under section 105 of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 815).

~FOOTNOTE 2
Heldenfels Brothers, Inc.'s Original Motion to Dismiss filed in Docket No. DENV 79-576-PM on July 26, 1979, contained the following statement:

"The investigation made on the basis of the above styled and numbered cause, occurred on Tuesday, July 25, 1978, as shown by the copy of the citation which was attached to the original RESULTS OF INITIAL REVIEW which was originally issued on September 20, 1978, copies of which are attached hereto as exhibits."

Contrary to Respondent's statement in its motion, no Results of Initial review, issued on September 20, 1978, were attached to the motion filed and none with that date were offered in evidence at the hearing. The only attachment to the motion was a "Proposed Assessment" issued on Form 1000-179 (MSHA) on March 15, 1979, listing a penalty of $78 for Citation No. 169213 and a penalty of $56 for Citation No. 170074. This "proposed assessment" (dated March 15, 1979), was the same as that attached to the Secretary of Labor's Petition for Assessment of Civil Penalties filed on July 2, 1979, in Docket No. DENV 79-576-PM.